IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1976

No. 76-807

MICHAEL B. GERCEY et al,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

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Petitioners, Michael B. Gercey et al, pray that a Writ of Certiorari issue to review the final Judgment of the United States Court of Appeals for the First Circuit entered on August 19, 1976, and the denial of a petition for rehearing entered on September 13, 1976.

I. OPINIONS BELOW

The Opinion of the Court of Appeals is included in the Appendix beginning at Page A-1. The Opinion of the United States District Court for the District of Rhode Island is reported at 409 F. Supp. 946 and is included in the Appendix at Page A-8.

II. JURISDICTION

The Judgment of the Court of Appeals was entered on August 19, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

III. QUESTIONS PRESENTED

1. Is the Suits in Admiralty Act to be so construed as to provide the defense of "discretionary function" to the United States?

2. Was there a duty owed to the paying passenger public by the Coast Guard to take positive steps to protect them from unseaworthy vessels whose certificates had been revoked?

3. Was the Coast Guard negligent in not inspecting the Comet for a period of two years, in derogation of the mandate of Section 391, Title 46, to inspect the hull of all steam vessels annually?

IV. STATUTES INVOLVED

The relevant provisions of the Act relating to STEAM VESSELS, 46 U.S.C.

Sections 390(a), 390(b), 390(c), 390(d), 391(a), 391(d), 391(e), and 435 are set forth in Appendix C.

V. STATEMENT OF THE CASE

Petitioners are the parents of Steven Gercey, who drowned when the motor vessel COMET sank off Point Judith, Rhode Island, on May 19, 1973. Originally, this suit was brought as a wrongful death action against the United States under the Federal Tort Claims Act, but the District Court of Rhode Island and, subsequently, the United States Court of Appeals for the First Circuit treated it as arising under the Suits in Admiralty Act, 46 U.S.C., Sections 741 through 752. Petitioners alleged that the negligence of the Coast Guard had brought about the sinking of the steam vessel COMET and, consequently, the death of their son, who was one of a charter party of twenty-five which had hired the vessel for a fishing expedition at a charge of $10 per person.

The matter was never tried, since the case in District Court was decided on Defendant's Motion for Judgment on the pleadings pursuant to Rules 12(b)(6) and 12(c) of the Federal Rules of Civil Procedure, on the grounds that the Plaintiffs had failed to state a claim upon which relief could be granted. Therefore, the District Court utilized the Complaint and proposed findings of fact in arriving at its Order granting Defendant's Motion for Judgment. A brief review of pertinent fact is, therefore, desirable:

The vessel COMET was built of wood in 1941, weighed approximately fifteen gross tons, was approximately forty-nine feet in length, and was powered by a 165 horsepower diesel engine. In the spring of 1970, while under the ownership of the National Youth Science Foundation, the vessel was leased by the University of Rhode Island School of Oceanography. It was issued a new certificate of inspection on July 22, 1970, after correction of a number of defects found therein, including rotted hull planks. It was next inspected by the Coast Guard on May 19, 1971, while in drydock, including once more a hull so rotted that the inspector was able to penetrate completely the two-inch hull plankings with a blunt screwdriver. The next day the owner of the boat notified the Marine Superintendent that no repairs were going to be made and that the boat was to be placed in "wet storage" at the Wickford Shipyard, only several miles from the Point Judith Coast Guard Station. From the date of inspection, May 19, 1971, until two years later when the boat sank on May 19, 1973, the COMET was never looked at by the Coast Guard.

In the meantime, in September of 1971, the COMET was purchased by William Jackson of Cumberland, Rhode Island, and subsequently used as a charter vessel during 1972 and 1973, the last date of course being when the decedent, Steven Gercey, drowned while a passenger for hire thereon. The evidence is conclusive that the sinking of the COMET was brought about by the vessel breaking apart in its hull, separating bow from stern.

The gravamen of Plaintiffs' Complaint was that the Coast Guard was obligated to follow its decertification of the COMET by taking some measures to see that the boat was not being used as a passenger boat, and that the Coast Guard, since it knew that the boat was being so used, or should have known, and doing nothing to protect passengers for hire, was negligent.

The District Court, in granting Defendant's Motion, held that Plaintiffs could not recover because they had not alleged that the Coast Guard's alleged negligence was a cause in fact of their son's death.

The Circuit Court of Appeals found this to be error. However, the Circuit Court of Appeals affirmed the District Court's judgment, despite concluding that the District Court was in error, inasmuch as the Appeals Court held that there was no duty to adopt a policy of taking positive steps to protect the public from vessels whose certificates have been revoked.

For the reasons set forth hereinafter, the Plaintiffs seek review of the Court of Appeals action.

REASONS FOR GRANTING THE WRIT

1. THE CIRCUIT COURTS OF APPEAL ARE IN CONFLICT OVER WHETHER THE "DISCRETIONARY FUNCTION" CAN BE UTILIZED BY THE UNITED STATES IN A SUITS IN ADMIRALTY ACTION.

Rule 19 of the Rules of the Supreme Court of the United States states that while neither controlling nor fully measuring the Court's discretion, a reason for granting a writ of certiorari exists where a Court of Appeals has rendered a decision in conflict with the decision of another Court of Appeals on the same matter.

28 U.S.C. Section 2680(a) states that the provisions of the Federal Tort Claims Act shall not apply to

> "any claim based upon an act or omission of an employee of the Government exercising due care in the execution of a statute or regulation, whether or not such statute or regulation be valid or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of the Federal agency or an employee of the government whether or not the discretion involved be abused."

The question as to whether a discretionary function exception would be implied under the Suits in Admiralty Act was decided affirmatively in Boston Edison Co. v. Great

Lakes Dredge & Dock Company and The United States of America, 423 F.2d 891 (C.A. 1, 1970).

That action involved a suit in admiralty against the United States of America and other co-Defendants. The Plaintiff sought permission from the United States to install submarine electric power cables under the Chelsea River in Massachusetts. A permit was issued providing that the United States would not be liable for future damages to the cables from future operations of the United States in improving navigation on the River. The Plaintiff installed the cables. Thereafter, the United States contracted with Great Lakes Dredge & Dock Company for the dredging of the River to improve navigation. While dredging the River, the Great Lakes Company damaged the cables which had been laid by the Plaintiff. Suit was brought by the Plaintiff against the United States for negligently supervising, planning, and conducting the dredging operation. The Court stated that the decision of the Secretary of the Army to cause a dredging of the River was a discretionary act on his part. The Court referred to the case of United States v. Muniz, 374 U.S. 150, 83 Sup. Ct. 1850. A footnote in the case stated that,

> "Other than the exception for prisoners' claims, the only remaining exceptions having no counterpart in the present act barred liability for governmental activity relating to flood control, harbor and river work, and irrigation projects to the extent that these activities constitute discretionary functions. The exception of 28 U.S.C. 2680(a) still preserves

> governmental immunity. U.S. v. Ure, 225 F.2d 709 (C.C.A. 9); Coates v. U.S., 181 F.2d 816 (C.C.A. 8); McGillic v. U.S., 153 F. Supp. 565 (U.S.D.C. D.C.)"

These cases exempted the United States from liability and negligence, both in planning and the actual operation of flood control projects.

Decisions in the United States District Courts have resolved the matter similarly. F & M Schaeffer Brewing Company v. United States, 121 F. Supp. 322 (U.S.D.C. Ed. N.Y.) involved a United States dredging operation which caused damage to private lands. The Court held that the Complaint asserted a claim based upon the exercise or performance of a discretionary function of the Federal Government within the meaning of the exception to the Federal Tort Claims Act.

The Court of Appeals for the First Circuit found no inconsistency between the policy enunciated by the Suits in Admiralty Act and the Federal Tort Claims Act, having in mind the exceptions to liability in the latter Act and the discretionary authority of the United States to make regulations for channel improvement.

At least one other circuit, however, has taken a contrary position to that taken in Boston Edison Co. v. Great Lakes. The case of DeBardeleben Marine Corp. v. United States, 451 F.2d 140 (C.C.A. 5) involved a suit in admiralty claim in which the Plaintiff was injured when his boat's anchor ruptured a gas pipeline that had been laid at a prior time pursuant to a United States

permit. The contention was that a government publication, the Coast and Geodetic Survey, did not publish the location of the pipeline until after the accident. The Court held, on the law, that the Federal Government's duty for a faulty marine chart terminates at the time a prudent shipowner reasonably would have learned of the true condition through advices in a subsequent publication. The charts are published by the Government with the knowledge that they will be disseminated through reliable channels to ships and crews and will be relied upon as accurate portrayals of the waters covered. Since the shipowners are required to have charts, what maritime law exacts of shipowners through decisions of admiralty courts may hardly be ignored by the executive agency responsible for the charts. The United States must, therefore, bear the burden of using due care in the preparation and dissemination of such charts and notices.

It is interesting to note that this Honorable Supreme Court has held that under the Federal Tort Claims Act, the United States is not immune from liability for the negligence of employees of the Forest Service in fighting fires. Rayonier Inc. v. United States, 352 U.S. 315. In Rayonier Inc., a train traveling through land owned by the United States threw off sparks which ignited brush negligently allowed to accumulate at the side of the tracks. The state in which the land was located and the United States had previously agreed that the U. S. Forest Service would suppress fires in the general area of the railroad. Surrounding landowners relied upon the United States to put out fires in the locale. Shortly after this fire started, the U. S. Forest Service took complete control of the situation. It was

alleged in the suit that the U. S. Forest Service was guilty of negligent and improper firefighting and, as a result of this negligence, the fire spread onto the Plaintiff's land. For several days, there had been decreasing humidity, accompanied by strong winds; but, the Forest Service kept only a few men guarding the fire, despite the fact that it was smoldering close to a kinder-dry accumulation of debris. During that time, there were men, equipment, and a plentiful supply of water available to the Forest Service and it was alleged that, if these resources had been properly utilized, the fire could have been complete extinguished. A strong wind blew some sparks from the smoldering embers into the debris accumulation and the fire exploded, spreading as much as twenty miles in one direction. The Court stated that the exceptions to tort liability of the United States were not relevant to this case.

> "It may be that it is novel and unprecedented to hold the United States accountable for the negligence of its firefighters; but, the very purpose of the Federal Tort Claims Act was to waive the Government's traditional, all-encompassing immunity from tort actions and to establish novel and unprecedented governmental liability."

The question of discretionary function must evidently be decided on the facts of each case. Analogies may be drawn between the Rayonier case and the present case, insofar as both the U. S. Forest Service and the U. S. Coast Guard are responsible

for the safety of persons and property within their respective jurisdictions.

2. THIS HONORABLE UNITED STATES SUPREME COURT SHOULD DECIDE THE IMPORTANT QUESTION OF THE OBLIGATION OF THE COAST GUARD TO EXERCISE REASONABLE CARE TO PROTECT THE PAYING PASSENGER PUBLIC FROM KNOWN UNSEAWORTHY PASSENGER STEAM VESSELS.

In the instant cause, the District Court for the State of Rhode Island conceded that

> "It might even be that the Coast Guard was actually negligent in not developing and implementing a procedure for following up vessels it had decertified."

However, the District Court based its dismissal of the case on the ground that there was no proximate cause.

The decision of the First Circuit Court of Appeals was diametrically opposite, since it decided there was proximate cause, but there was no obligation for the Coast Guard to concern itself with vessels it had decertified, albeit they might be dangerously unseaworthy, witness the COMET.

Were the Coast Guard given merely inspection powers only, this interpretation might be more tenable. However, equal powers of enforcement buttressed by severe penalty provisions for violations leads to the inescapable conclusion that the inspection process was to be coupled with a reasonable follow through to discourage the operation of unseaworthy vessels, which could

conceivably lead to the loss of lives at sea.

The question of the liability of the United States for acts and omissions of the United States Coast Guard has not been definitively resolved by this Honorable Supreme Court. Rule 19 of the Supreme Court provides that where a court of appeals has decided an important question of federal law which has not been, but should be, settled by the Supreme Court, this Court may, in the exercise of the measure of its discretion, grant review on writ of certiorari.

CONCLUSION

The question of whether acts and omissions of the United State Coast Guard can subject the United States to liability under suits in admiralty, as well as the question of the liability of the United States for the exercise of a discretionary function under the Suits in Admiralty Act, are questions of Federal law which have not been, but which should be, decided by this Court. The latter question has been the subject of conflicting decisions in the various circuit courts of appeal for the United States and has, thus, assumed the character of a special and important issue which, in sound judicial discretion, ought to be reviewed by this Honorable Supreme Court on writ of certiorari.

For the foregoing reasons, it is urged that this Petition for Writ of Certiorari be granted.

Respectfully submitted,

Abraham Goldstein
Attorney for Petitioner

November 11th, 1976

APPENDICES

APPENDIX A

United States Court of Appeals
For the First Circuit

No. 76-1137

MICHAEL B. GERCEY, et al.,

PLAINTIFFS, APPELLANTS,

v.

UNITED STATES OF AMERICA,

DEFENDANT, APPELLEE.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND
[409 F. Supp. 946 (D. R.I. 1976)]
(HON. RAYMOND J. PETTINE, *U.S. District Judge*)

Before COFFIN, *Chief Judge*,
MCENTEE and CAMPBELL, *Circuit Judges*.

Abraham Goldstein for appellants.
Mark N. Mutterperl, Attorney, Appellate Section, Civil Division, Department of Justice, with whom *Rex E. Lee*, Assistant Attorney General, *Lincoln C. Almond*, United States Attorney, and *Robert Kopp*, Attorney, Appellate Section, Civil Division, Department of Justice, were on brief, for appellee.

August 19, 1976

COFFIN, *Chief Judge*. Plaintiffs-appellants are the parents of Steven Gercey, who drowned when the motor vessel COMET sank off Port Judith, Rhode Island on May 19, 1973. They instituted this wrongful death action against the United States under the Suits in Admiralty Act, 46 U.S.C. §§ 741-52,[1] alleging that the Coast Guard had, by its negli-

[1] The case was originally brought under the Federal Tort Claims Act, 28 U.S.C. §§ 2671-80, but the district court, relying upon *Roberts* v. *United States*, 498 F.2d 520 (9th Cir. 1974), treated it as arising under the Suits in Admiralty Act. *See also Beeber* v. *United States*, 338 F.2d 687 (3rd Cir. 1964). Neither party challenges this ruling upon appeal.

gence, caused their son's death. They contended that the Coast Guard had revoked the COMET's certificate to operate as a "passenger-carrying vessel" because it found the vessel to be unsafe, but that it failed to take positive, feasible steps to protect individuals like their son from the danger of voyaging on the vessel. The district court, on the basis of the pleadings and proposed findings of fact, granted defendant's motion for judgment on the pleadings, holding that plaintiffs had failed to allege that defendant's negligence was a cause-in-fact of decedent's death. 409 F. Supp. 946 (D. R.I. 1976). We affirm, although on a different ground.

The facts are relatively few and undisputed. The COMET, a 30 year old, 49 foot wooden motor vessel, capable of carrying up to 39 passengers, failed to pass the Coast Guard inspection in 1971, principally because its hull was found to be rotten. The Coast Guard accordingly removed its certificate to operate as a passenger carrying vessel. Without this certificate the COMET could not lawfully carry six or more passengers for hire, *see* 46 U.S.C. § 390c, and, if it were to do so, it and its master would be liable for up to $1000 in fines. *See id.* § 390d. The lack of such a certificate, however, does not preclude a vessel from otherwise operating lawfully.

Following the revocation of the COMET's certificate, plaintiffs allege that the Coast Guard took absolutely no follow up measures to protect the fee paying public from the danger of riding on the vessel. According to plaintiffs, the sole action taken by the Coast Guard was to remove the certificate from the COMET — a 4" by 6" piece of paper which presumably had been displayed "in a conspicuous place on the vessel where it [was] most likely to be observed by passengers", *see id.* § 400 — and file it in Washington.

In the fall of 1971, the COMET was sold to one William

Jackson, who, possibly out of ignorance of both the condition of the vessel and the requirements of federal law, proceeded to carry large groups of fee paying passengers on it during 1972 and 1973. During this period, the COMET made trips to and from the port of Galilee, at the head of which was a Coast Guard station. The record reflects that no Coast Guard personnel were aware either of the vessel's movements or that it had been decertified. On May 19, 1973, Jackson took a large group of fee paying passengers, including decendent, on a fishing trip off the coast of Rhode Island. Although the weather and sea conditions were alleged to be quite normal, the COMET, some five miles off the coast, split in two and sank. Decedent, Jackson, and fifteen other passengers perished.

The theory upon which plaintiffs seek to recover can be stated simply: they maintain that the Coast Guard is under either a statutory or common law duty to take reasonable steps to protect the fee paying public from vessels which the Coast Guard has refused to certify and which it knows to be unsafe. Plaintiffs list half a dozen actions which they allege the Coast Guard could easily have taken and which, in their view, would have substantially increased the likelihood that fee paying passengers like their son would not have voyaged on the COMET. These include: (1) informing the public of the condition of all such vessels by either a public notice or a sign placed on the vessel; (2) periodically checking to determine if such vessels are being used contrary to § 390c; (3) informing any new purchaser of the condition of the vessel; and (4) notifying all local Coast Guard units which vessels are decertified. Although the district court thought it unlikely that the Coast Guard could be held liable in tort for injuries proximately caused by its failure to take these measures, it did not reach this issue. It held instead that the plaintiffs could not recover since they had not claimed that

the Coast Guard's alleged negligence was a cause-in-fact of their son's death. This we think was error.

In deciding that plaintiffs had failed to allege a sufficient causal connection between the alleged acts of nonfeasance and decendent's death, the district court applied too stringent a standard. It apparently believed that plaintiffs could not go to the jury on the issue of causation-in-fact unless they alleged that the implementation of the measures they propose would have prevented the COMET from sinking with fee paying passengers aboard. This is too harsh a test. Causation-in-fact is almost always a jury question. To survive a motion for judgment on the pleadings, plaintiffs need only have shown that reasoning minds could conclude that the Coast Guard's alleged misconduct was a substantial factor in producing plaintiffs' injury — which was not the sinking of the vessel per se, but their son's death. *See* W. Prosser, Handbook of the Law of Torts 289 (4th ed. 1971). Plaintiffs clearly made this showing. Reasonable men could conclude that, if the Coast Guard had performed but one of the measures plaintiffs suggest — requiring that decertified vessels display notices informing the public of its condition — decedent probably would not have gone aboard the vessel and, thus, would not have drowned.[2] Although we understand why the principles of judicial economy and restraint led the district court, when faced with the novel question of the Coast Guard's liability, to prefer this narrow ground of decision, we believe we must reach the broader question of the Coast Guard's liability.

In addressing this question, we note at the outset that the Coast Guard's alleged negligence lies in failing to adopt

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[2] Defendant suggests that the district court's decision was based upon the plaintiffs' failure to allege specifically that this type of causal connection existed. Such a position seems to us unduly technical and contrary to the directive that pleadings be construed to do "substantial justice". Fed. R. Civ. P. 8(f).

a policy of taking positive steps to protect the public from vessels whose certificates have been revoked, not in imperfectly executing a federal program established either by an act of Congress or a federal regulation. *Compare Indian Towing Co.* v. *United States*, 350 U.S. 61 (1955) *and Coastwise Packet Co.* v. *United States*, 398 F.2d 77 (1st Cir. 1968). Neither the Congress nor the Coast Guard has explicitly required that positive action be taken to protect the public from such vessels. Congress has mandated only that the Coast Guard periodically conduct certain types of inspections of passenger carrying vessels, *see* 46 U.S.C. §§ 390a, 391, revoking the certificates of vessels which fail to meet federal requirements. *Id.* §§ 390c(c), 391. Although Congress plainly contemplated that the Coast Guard would take certain specific measures to induce compliance with federal law, *see id.*, §§ 390d, 435, it neither expressly nor by necessary implication imposed a duty upon the Coast Guard to devise, fund, staff, and implement the kind of follow-up system which plaintiffs believe is required by ordinary prudence. Although we agree with plaintiffs that the Coast Guard has the discretionary authority to adopt such a follow-up program, it has not done so.

The decision whether to institute such a policy, in our view, involves a basic policy judgment as to how the public interest may best be promoted. The Coast Guard has limited resources and a myriad of regulatory responsibilities. A determination whether it would be in the public interest to make a major commitment of the Goast Guard's resources to the creation of a follow-up system would require consideration of a host of factors: how effective the present enforcement measures — whatever they are — have been; how much more protection would be afforded the fee paying public if such a system were created; and, finally, whether the increased protection would be sufficient to warrant both the

commitment of the Coast Guard's resources and the possible diversion of such resources from other regulatory activities.[3]

We need not attempt to strike the balance between these perhaps competing interests. The critical question for our consideration is not whether we agree with the plaintiffs' contention that ordinary prudence requires that the Coast Guard take broad, positive measures to protect the fee paying public from decertified vessels. Rather, it is whether a federal court has the power to impose liability on the Coast Guard for failing to make, and implement, the basic policy decision that the public interest requires its limited resources be committed to such a program. We conclude that we have not been conferred that power by the Suits in Admiralty Act.

The Suits in Admiralty Act, of course, effects a waiver of the sovereign immunity of the United States for certain maritime claims against the United States. Unlike the Federal Tort Claims Act, *see* 28 U.S.C. § 2680(a), the Suits in Admiralty Act does not contain an express exception for harm caused by the exercise of "discretionary functions", a category which includes, and probably should be limited to, basic "policy judgments as to the public interest". *See Griffin* v. *United States*, 500 F.2d 1059, 1064 (3d Cir. 1974); K. Davis, Administrative Law Treatise § 25.08 (1976 Supp.). Although the Suits in Admiralty Act contains no express exception, we think that sound principles demand that the act be construed as subject to such discretionary function exception.[4] *See* K. Davis, *supra*, § 25.13 (1958 ed. & 1970

[3] The magnitude of this tragedy prompts us to observe that there may be measures short of a comprehensive follow-up system which might, at little cost, avert some disasters. For example, if Coast Guard stations were advised of passenger carrying vessels which had recently been decertified, officials might be able to identify obvious violators within their area of surveillance. We would hope that the events giving rise to this case would prompt a search for feasible means to lessen the likelihood of their reoccurrence.

[4] This is only the second time, to our knowledge, that a court has addressed the question whether a "discretionary function" exception should be implied

Supp.); L. Jaffe, Judicial Control of Administrative Action, 244 n. 43 (1965). *Compare King* v. *Seattle*, 84 Wash. 2d 239, 525 P.2d 228 (1974). Were there no such immunity for basic policy making decisions, all administrative and legislative decisions concerning the public interest in maritime matters would be subject to independent judicial review in the not unlikely event that the implementation of those policy judgments were to cause private injuries. That, in our view, would be an intolerable state of affairs, *see United States* v. *Sandra & Dennis Fishing Co.*, 372 U.S. 189, 195 (1st Cir. 1967), and we decline, in the absence of an express Congressional directive to the contrary, to construe this waiver of sovereign immunity as providing the federal courts with that power. Accordingly, we refuse to consider imposing liability on the Coast Guard for failing to adopt a comprehensive program of protecting the public from decertified vessels.

Affirmed.

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under the Suits in Admiralty Act. We earlier assumed, without discussion, that such an exception did apply to the act. *See Boston Edison Co.* v. *Great Lakes Dredge & Dock Co.*, 423 F.2d 891 (1st Cir. 1970). A second court, however, has taken a contrary position, *see De Bardeleben Marine Corp.* v. *United States*, 451 F.2d 140, 146 & n. 15 (5th Cir. 1971) (dictum), relying on cases holding that operating a man-of-war, which in the court's view was surely discretionary, could subject the United States to liability under the act. The validity of this conclusion depends on the premise that operating a vessel is a "discretionary function" within the meaning of that exception to the waiver of sovereign immunity. Our view is that, like fighting a fire, *see Rayonier, Inc.* v. *United States*, 352 U.S. 315 (1957), operating a vessel does not involve a basic policy judgment of how best to promote the public interest and, as such, is not a "discretionary function". So viewing the premise in *De Bardeleben Marine Corp.*, we cannot accept the court's conclusion.

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APPENDIX B

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF RHODE ISLAND

Civil Action No. 74-29

STEVEN GERCEY, Decedent,
MICHAEL B. GERCEY and MADELINE M. GERCEY,
Parents and next-of-kin,

Plaintiffs,

v.

UNITED STATES OF AMERICA,

Defendant.

O P I N I O N

February 6, 1976

PETTINE, Chief Judge. On May 19, 1973, the Motor Vessel COMET sank off Point Judith, Rhode Island, with a loss of sixteen lives, including that of Steven Gercey, the plaintiff's decedent. The Plaintiffs in this wrongful death action allege that the United States Coast Guard failed to use due care in carrying out its statutory duty of insuring the safety of passengers upon vessels that are required to be inspected and certified as safe for passenger travel and is therefore liable to the decedent's estate in an amount over $500,000. That matter is presently before the Court on defendant's motion pursuant to Rules 12(b)(6) and 12(c) of the Fed.R.Civ.P. for judgment on the

pleadings, on the grounds that plaintiffs have failed to state a claim upon which relief can be granted.

I

The proposed findings of fact of both the plaintiffs and the defendant agree on most major points. The vessel COMET was built of wood in 1941, weighed 15 gross tons, was about 49 feet in length, and was powered by a 165 horsepower diesel engine. In the spring of 1970, while under the ownership of the National Youth Science Foundation, the vessel was leased by the University of Rhode Island School of Oceanography. Upon entering Rhode Island waters and a new Coast Guard inspection zone, the COMET was inspected by an officer of the Coast Guard Marine Inspection Office and after correction of a number of defects was found to have met all the requirements for a new certificate of inspection on July 22, 1970. The COMET was next inspected by the Coast Guard on May 19, 1971, while the vessel was in dry dock. A number of defects were found, and the plaintiffs allege that the inspector was able to penetrate completely the hull plankings with a blunt screwdriver. The certificate of inspection was removed from the vessel and on the following day, the University of Rhode Island informed the Marine Superintendent that they did not intend to make the necessary repairs and that the vessel would be placed in "wet storage" at Wickford Shipyard.

In September of 1971 the COMET was purchased by William Jackson of Cumberland, Rhode Island, apparently for use as a charter vessel, and plaintiffs allege that

the boat was so used during the summer of 1972. On May 19, 1973, a group of people, which included the decedent, STEVEN GERCEY, chartered the COMET for a fishing trip. After being out of port for about forty-five minutes the vessel broke up and sank. Among those lost were STEVEN GERCEY and the boat's owner and captain, William Jackson. The cause of the disaster has not been established, although the plaintiffs allege that the weather and sea conditions were such they they did not contribute to the accident.

II

The plaintiffs purport to bring this action under the Federal Tort Claims Act, 28 U.S.C. sec. 2671-2680, and allege jurisdiction under 28 U.S.C. sec 1346(b). The defendant concedes that this Court has jurisdiction over this action but contends that the Federal Tort Claims Act is not applicable to this case, which, they argue, must be based on admiralty jurisdiction under 28 U.S.C. sec. 1333. Determination of the proper basis of jurisdiction in this case will determine whether Rhode Island or federal substantive law is to be applied. [1] Under the Federal Tort Claims Act, the applicable law is that of the state in which the act or omission complained of occurred, 28 U.S.C. sec. 2674; Richards v. United States, 369 U.S. 1 (1962); United States v. Schultz, 282 F.2d 628 (1st Cir. 1960), cert. denied 365 U.S. 817. Suits in admiralty, on the other hand, are governed by federal substantive and procedural law, Kermarkek v. Campagnie Generale Transatlantique, 358 U.S. 625 1959; St. Hilaire Moye v. Henderson, 496 F.2d 973 (8th Cir. 1974).

The Federal Tort Claims Act expressly excludes from its coverage any claim for which a remedy is provided by the Suits in Admiralty Act, 46 U.S.C. sec. 741-752, or the Public Vessel Act, 46 U.S.C. sec. 781-790. 28 U.S.C. sec. 2680(d). The plaintiffs argue, however, that this does not mean that all maritime or admiralty courts are beyond the coverage of the Federal Tort Claims Act, since, they claim, these two admiralty statutes do not embrace all maritime torts. In particular they cite Moran v. United States, 102 F.Supp. 275, 277 (D. Conn. 1951), where the Court wrote, "Maritime torts of the employees of the United States, as distinguished from torts of vessels of the United States, were intended to be covered by the Federal Tort Claims Act."

In 1960, however, the Suits in Admiralty Act was amended, and as the Court of Appeals for the Ninth Circuit explained in Roberts v. United States, 498 F.2d 520, 525-26 (1974), the language added means that torts of government employees as well as government vessels are to be covered by the federal courts' admiralty jurisdiction: 2/

> "The District Court, believing that the admiralty statutes extended only to claims involving United States vessels or cargo concluded that the appellees' maritime claim was maintainable solely under the FTCA. Prior to 1960, Congress amended section 742 of the SIA by deleting the language which restricted the statute to claims involving merchant vessels and by substituting a broad new jurisdictional statement:

> 'In cases where if such vessel were privately owned or operated, or if such cargo were privately owned or possessed, or if a private person or property were involved, a proceeding in admiralty could be maintained, any appropriate nonjury proceeding in personam may be brought against the United States. . .' Pub.L.No. 86-770, sec. 3, 74 Stat. 912. (Emphasis Added)
>
> The addition of the phrase 'or if a private person. . .were involved' has been interpreted by a majority of courts as a legislative attempt to bring all maritime torts asserted against the United States within the purview of the SIA. See De Bardeleben Marine Corp. v. United States, 451 F.2d 140 (5th Cir. 1971); Richmond Marine Panama, S.A. v. United States, 350 F.Supp. 1210, 1219-1220 (S.D.N.Y. 1972); Tankrederiet Gefion A/S v. United States, 241 F.Supp. 83 (E.D. Mich. 1964); Contra, J. W. Petersen Coal & Oil Co. v. United States, 323 F.Supp. 1198 (N.D. Ill. 1970). Moreover, this expended interpretation of the SIA appears to conform with retrospective Congressional understanding of the Act, as the court in Richmond Marine Panama, S.A. v. United States, supra, notes:

'Although subsequent Congressional explanation of the meaning of a statute is not binding on the courts, it is interesting to note, nevertheless, that a Senate Report of August 17, 1972 explained that the 1960 amendment extends jurisdiction under the Suits in Admiralty Act 'to the full range of admiralty cases which might have been maintained had a private person or peoperty been involved rather than the Government or its agents and employees or property.' Senate Report No. 92-1079, 92d Cong., 2d Sess., 1972, 9 U.S. Code Cong. and Admin. News, pp. 4045, 4050." Id. 350 F.Supp. at 1220, note.

It appears then that all the courts that have construed the 1960 amendment, with the exception of a district court in Illinois in J. W. Peterson Co. & Oil Co. v. United States, 323 F.Supp. (N.D.Ill. 1970), upon which the plaintiffs heavily rely, have held that the maritime courts of government employees are now covered by the Suits in Admiralty Act. This Court is persuaded that the majority view on this question is the correct one, particularly in light of the fact that the Peterson decision was an interlocutory decision which the United States never appealed because the plaintiff Peterson's case was ultimately dismissed on the merits by the District Court. Defendant's Memorandum in Support of Motion at 2. Thus, the plaintiffs' claim in this case must be heard in admiralty, where it can be brought under 46 U.S.C. sec. 742, and cannot be heard under the Federal Tort Claims Act,

since it is barred by the exception for claims in admiralty, 28 U.S.C. sec. 2680(d).

III

The plaintiffs contend that the substantive basis of the defendant's liability lies in the duty imposed upon the Coast Guard by statute to inspect passenger vessels and certify that they are seaworthy and safe. 46 U.S.C. sec. 390, 390a - 390d instructs the Secretary of the Executive Department in which the Coast Guard is operating to cause each small passenger carrying vessel [3] to be inspected at least once every three years for seaworthiness and safety. [4] No such vessel may operate without a certificate of inspection, [5] and violators may be fined up to $1,000 for each violation, for which sum the vessel may be seized. [6] The defendant concedes that these provisions were applicable to the COMET but contends that the Coast Guard was diligent in the matter of inspection and properly decertified the vessel when the occasion required.

The plaintiffs do not appear to contest the defendants on this point, but they contend that the defendant had a duty not only to inspect the vessels and to certify or decertify them but also to enforce these provisions. The Coast Guard was negligent, they assert, in failing to have some rudimentary mechanism to protect the paying passenger public from unseaworthy vessels after their decertification. The statutes themselves, the plaintiffs argue, speak of some duty of ongoing enforcement to follow-up on the inspections of certified vessels and in

particular to see that decertified vessels are not used to carry passenger, citing 46 U.S.C. sec. 435:

> "435. Re-inspections and notice for repairs--Enforcement of requirements.-- In addition to the annual or biennial inspection, the head of the department in which the Coast Guard is operating shall require the Coast Guard to examine, at proper times, inspected vessels arriving and departing to and from their respective ports, so often as to enable them to detect any neglect to comply with the requirements of law, and also any defects or imperfections becoming apparent after the inspection aforesaid, and tending to render the navigation of such vessels unsafe; and if there shall be discovered any omission to comply with the law, or that repairs have become necessary to make such vessel safe, the master shall at once be notified in writing as to what is required. All inspections and orders for repair shall be made promptly. When it can be done safely, repairs may be permitted to be made where those interested can most conveniently do them. And whenever it is ascertained that any vessel subject to the provisions of this title or Acts amendatory or supplementary thereto, has been or is being navigated or operated without complying with the terms of the vessel's certificate or inspection. . .the owner or master of said vessel shall be ordered to correct such unlawful conditions, and the vessel may be

> required to cease navigating at once and to submit to re-inspection; and in case the said orders shall not at once be complied with, the vessel's certificate of inspection shall be revoked, and the owner, master- or agent of said vessel shall immediately be given notice, in writing, of such revocation; and no new certificate of inspection shall be again issued to her until the provisions of this title or Acts amendatory or supplementary thereto have been complied with. Any vessel subject to the provisions of this title or Acts amendatory or supplementary thereto operating or navigating or attempting to operate or navigate after the revocation of her certificate of inspection and before the issuance of a new certificate shall, upon application by a department or agency charged with the enforcement of such title or Acts, to any district court of the United States having jurisdiction and by proper order or action of said court in the premises, be seized summarily by way of libel and held without privilege of release by bail or bond until a proper certificate of inspection shall have been issued to said vessel. . ." 7/

The plaintiffs argue that the Coast Guard was negligent in carrying out this duty to enforce the inspection statutes cited above because after decertifying the COMET the

Coast Guard took absolutely no follow-up measures to insure that the decertified vessel would not be illegally used to carry passengers. The sole action taken by the defendant, according to the plaintiffs, was to remove from the COMET a 4" x 6" piece of paper and file it in Washington, D.C. It took none of the actions that a reasonable man would have undertaken to protect the paying passenger public whose safety Congress entrusted to the Coast Guard.

Plaintiffs list a half dozen actions that could have been reasonably taken by the Coast Guard, any one of which could possibly have prevented the tragic loss of life that occurred on May 19, 1973 when the COMET sank. The Coast Guard could have 1) required the COMET's former owner or the marina owner to inform it of any change of ownership of the vessel; 2) informed the new purchaser of the condition of the vessel and inquired of him his purpose in acquiring the vessel; 3) informed either the general public or the specific passengers by way of a public notice or a sign of the condition of the vessel; 4) notified local Coast Guard units that the vessel had been decertified; 5) periodically revisited the vessel to see if it was in use or at least called the shipyard to check on its status; or 6) seized the vessel under the authority of 46 U.S.C. sec. 435.

There can be no doubt that several of these courses of action are eminently reasonable and perhaps might have played a role in preventing the events of May 19, 1973. It is noteworthy that one of the recommendations from the Marine Inquiry

Board's preliminary report is that the Coast Guard develop some mechanism whereby it can maintain a comprehensive file by which it can keep track of decertified vessels. Plaintiffs Supplemental Memorandum at 14-15. It might even be that the Coast Guard was actually negligent in not developing and implementing a procedure for following-up on vessels it had decertified. But such a conclusion would not necessarily mean that the plaintiffs had stated a claim in this case for which relief can be granted.

The plaintiffs have stated a novel claim for which there is no precedent under the Coast Guard inspection statutes on which they rely, and if found to be implied by the statutes, such a cause of action could have wide-ranging effects on admiralty jurisdiction and on the principles of governmental liability in general. While I do not rule out the possibility that such a casue of action could be found to exist, I must note that I do not find the authority the plaintiffs have cited in support of their position to be particularly compelling.

The essence of plaintiffs' argument is simply that a) defendant has a statutory duty to enforce the inspection statutes; b) defendants did not reasonably carry out this duty; c) therefore defendants are liable for injuries resulting from this breach of duty. It is a general principle of governmental tort liability that a governmental unit is not liable for failure to enact or enforce an ordinance. 47 Am.Jur. 2d, Municipal, School, and State Tort Liability, sec. 144. While there may be exceptions to this proposition, plaintiffs have provided

meager justification for invoking any such exception in this context. Even if the Coast Guard were under an absolute duty, as plaintiffs contend, to enforce affirmatively the inspection statutes, the Coast Guard's choice of means by which to carry out that duty would be a completely discretionary, policy-making decision, and governmental agencies are generally free from liability resulting from such decisions. Cf. Federal Tort Claims Act, 28 U.S.C. sec. 2680(a); Dalehite v. United States, 346 U.S. 15 (1953).

In an effort to overcome what I would characterize as a strong presumption against liability in the present context, the plaintiffs cite several cases which they contend support their allegations that the defendant had a statutory duty to warn the new purchaser, the passengers, or the public in general about the condition of the COMET, and that governmental agencies can be held liable for negligently carrying out a duty to inspect. Plaintiffs cite the case of Indian Towing Co., Inc. v. United States, 350 U.S. 61 (1955) in support of their claim of defendant's duty to warn. According to the Court of Appeals for this Circuit, however, the duty to warn in Indian Towing developed out of the principle "that the government must not mislead, and must not induce reliance upon a belief that it is providing something which, in fact, it is not providing." United States v. Sandra & Dennis Fishing Corp., 372 F.2d 189, 195 (1st Cir. 1967).

In the instant case, there is little support for the proposition that the new purchaser, the passengers, or the general public relied either on an expectation that

they would be warned or on a belief that all passenger-carrying vessels in operation met Coast Guard safety requirements. Plaintiffs also cite a series of cases, including a recent Rhode Island decision, Buszta v. Souther, 232 A.2d 396, 102 R.I. 609 (1967) that hold inspectors liable to third parties injured as a result of negligent inspection despite the absence of privity of contract between the third party and the inspector. In the case at bar, however, there is no allegation that the Coast Guard's original inspection of the COMET was deficient, only that the defendant failed to follow through with subsequent enforcement of the decertification, a factor not present in the plaintiffs' negligent inspection cases.

Neither party, even after a request by the Court for additional memoranda, has briefed the question of liability for failure to enforce the inspection statutes with much imagination. There are several analogous areas that come to mind the exploration of which could perhaps have shed light on the present question, but neither side has offered any discussion of them. For example, is a state vehicle agency liable if a car that has failed to pass a state safety inspection illegally returns to the road and causes an accident in which third parties are injured? Is the Federal Aviation Administration liable if insufficient follow-up of its safety inspection allows an unsafe airplane to be illegally used by an airline and the plan subsequently crashes? Is a local building commissioner liable for injuries caused when an apartment building that has been repeatedly cited for violations of the fire code but never ordered closed catches fire?

It is not necessary at this point, however, to explore fully these questions or reach a final determination of whether the plaintiffs have a cause of action against the United States for its failure reasonably to enforce the inspection statutes, for it is the conclusion of this Court that even if the Coast Guard breached such a duty to the plaintiffs, it would not be possible for the plaintiffs to establish that such breach was the proximate cause of their injuries.

IV

The defendant has argued in its memoranda that even if the Coast Guard were negligent, the action of the boat owner in taking out passengers for hire in a vessel he knew or should have known was without Coast Guard certification was such an intervening act of negligence as to preclude liability of the United States. I do not agree. It is literally hornbook law that a defendant may be held liable in the presence of a major intervening cause if the intervention of the later cause is a significant part of the risk involved in the defendant's conduct. The defendant, therefore, is to be held liable if the intervening cause is "foreseeable". W. Prosser, Law of Torts, sec. 44 at 272 (4th Ed. 1971). The same is true even if the intervening cause is an intentional or criminal act if it is one the defendant might reasonably anticipate and against which it would be required to take precautions. Id. at 275. In the present case it is likely that the plaintiff would be able to prove at trial that the Coast Guard could have reasonably anticipated that if it inadequately

enforced the inspection statute vessel owners like Mr. Jackson might illegally carry passengers on decertified vessels. In that event the intervening cause of Mr. Jackson's own negligence would not be sufficient to insulate the United States from liability.

In order to reach such a point, however, the plaintiffs would first have to prove that the Coast Guard's alleged negligence was a major causal link in the events culminating in the sinking of the COMET. For as Professor Prosser points out, the problem of intervening cause is not one of causation at all, since it does not arise until after causation has already been established. Id. at 270. It is the conclusion of this Court that the plaintiffs have failed to clear this initial hurdle. Based on the plaintiffs' pleadings, proposed findings of fact, and memoranda of law, and viewing all the facts presented in the pleadings and the inferences to be drawn therefrom in the light most favorable to the plaintiffs, see Wright and Miller, Federal Practice and Procedure: Civil sec. 1368 at 690, I can find no showing that the alleged negligence on the part of the Coast Guard in enforcing the inspection statutes was the proximate cause of the plaintiffs' injuries. The plaintiffs have therefore failed to state a claim for which relief can be granted.

The notion of proximate cause is a confusing concept in tort law and one often utilized as a means of disguising policy judgments that have no connection with questions of causation at all. Prosser, supra, sec. 41 at 237. Nevertheless, while notions of proximate cause are

sometimes used to limit liability even where causation in fact can be demonstrated, e.g., where there is an intervening cause sufficient to insulate a negligent party from liability, the converse is not true: barring the application of principles of strict liability, there can be no finding of proximate cause, and hence no liability, where the defendants negligence was not a cause in fact of the plaintiffs injury.

A useful tool for analyzing questions of causation in fact is the "but for" or "sine qua non" rule:

> "The defendant's conduct is not a cause of the event, if the event would have occurred without it." Id. 239.

In the case at bar the plaintiffs have made no factual allegation that standing alone or operating through inference would support a conclusion that "but for" the Coast Guard's negligence, the vessel COMET would not have sunk on May 19, 1973 and STEVEN GERCEY would not have lost his life.

Even assuming that the Coast Guard was negligent in carrying out its duties, there is no allegation that a reasonable and diligent enforcement effort by the Coast Guard, perhaps including some or even all of the measures proposed by the plaintiffs for keeping track of, and protecting the public from, decertified vessels would have prevented the tragic events of May 19. The only means of enforcement the Coast Guard could use that would effectively protect the public from decertified vessels in all cases would be a policy of seizing all such vessels immediately upon decertification.

Not only would such a policy be unreasonable on its face, however, but it would probably far exceed the Coast Guard's power of seizure as provided in 46 U.S.C. sec. 435. While it is conceivable that less drastic enforcement efforts could have been adopted by the Coast Guard which might have in fact succeeded in preventing Mr. Jackson from using the COMET for fishing charters after it had been decertified, no such facts have been alleged in the pleadings or included in the plaintiffs' proposed findings of fact. Consequently, I conclude that the plaintiffs have not alleged that the Coast Guard's negligence was in fact a cause of the plaintiffs' injuries and that the plaintiffs have therefore failed to state a claim for which relief can be granted.

One point should be made in conclusion however. The loss of sixteen lives with the sinking of the COMET was a terrible and needless tragedy. The plaintiffs are denied relief in this case because they have not claimed that lack of care by the Coast Guard in enforcing the inspection statutes was an actual cause of this tragedy. But there can be no doubt that improved enforcement of these statutes might help avert similar accidents in the future. The record before me indicates that the Coast Guard has absolutely no standard procedure for keeping track of decertified vessels, and while this may not result in tort liability, at least in this particular case, it is a shameful record nonetheless. This Court can only hope that the Coast Guard has learned from this experience and will devise and implement, as rapidly as possible, the procedures necessary

to reduce the likelihood of this type of tragedy from recurring.

Defendant's motion for judgment on the pleadings is hereby granted.

/s/ Raymond J. Pettine
Chief Judge

Dated February 6, 1976

F O O T N O T E S

1/ Although the choice between Rhode Island and federal law conceivably could make a difference if this case were to go to trial, it has little effect upon the resolution of the present motion. Even if Rhode Island law is applied, the plaintiffs concede that the duty they assert the defendants breached is based upon the federal statutes which have never been the basis for a decision under Rhode Island law, see Section III, infra, and there is no Rhode Island case law on the subject of proximate cause.

2/ 46 U.S.C. sec. 742 now reads in relevant part as follows, with the pertinent language added in 1960 underlined:

> "In cases where if such vessel were privately owned or operated, or if such cargo were privately owned or possessed, or if a private person were involved, a proceeding in admiralty could be maintained, any appropriate nonjury proceeding in personam may be brought against the United States. . ."

That torts of government employees were to be covered by the Suits in Admiralty Act is also indicated by the elimination of the proviso originally appearing at the end of the first sentence:

> "provided that such vessel is employed as a merchant vessel or is a tugboat operated by such corporation."

3/ "The term 'passenger-carrying vessel' means any vessel which carries more than six passengers, and which is (1) propelled in whole or in part by steam or by any form of mechanical or electrical power and is of fifteen gross tons or less; (2) propelled in whole or in part by steam or by any form of mechanical or electrical power and is of more than fifteen and less than one hundred gross tons and not more than sixty-five feet in length measured from end to end over the deck excluding sheer. . ."

4/ "The Secretary shall, at least once every three years, cause to be inspected each passenger-carrying vessel, and shall satisfy himself that every such vessel (1) is of a structure suitable for the service in which it is to be employed; (2) is equipped with the proper appliances for lifesaving and fire protection in accordance with applicable laws, or rules and regulations prescribed by him; (3) has suitable accommodations for passengers and the crew; and (4) is in a condition to warrant the

belief that it may be used, operated, and navigated with safety to life in the proposed service and that all applicable requirements of marine safety statutes and regulations thereunder are faithfully complied with." 46 U.S.C. sec. 390a (a).

5/ "No passenger-carrying vessel shall be operated or navigated until a certificate inspection in such form as may be prescribed by the regulations promulgated by the Secretary under the authority of this Act (sec. 390 and note-390g, 404 526f of this title), has been issued to the vessel indicating that the vessel is in compliance with the provisions of this Act (sec. 390 and note-390g, 404, 526f of this title), and the rules and regulations established hereunder. . ." 46 U.S.C. sec. 390c (a).

6/ "Any owner, master, or person in charge of any vessel subject to this Act (sec. 390 and note-390g, 404, 526f of this title), who violates the provisions of this Act (sec. 390 and note-390g, 404, 526f of this title), or the rules and regulations established hereunder, shall be liable to the United States in a penalty of not more than $1,000 for each such violation, for which sum the passenger-carrying vessel shall be liable

and may be seized and proceeded against by way of libel in any district court of the United States having jurisdiction of the violation

7/ The defendant argues that this provision does not apply to vessels of the COMET's classification. The reference in sec. 435 to "annual or biennial inspection", it contends, indicates that it is referring to the inspection requirements of 46 U.S.C. sec. 391(a), (b), neither of which defendant asserts, is applicable to small diesel vessels like the COMET. The annual hull inspection required by sec. 391(a), however, applies to "every steam vessel carrying passengers." Since sec. 361 defines a steam vessel for the purposes of these provisions as any vessel "propelled in whole or in part by steam or by any other form of mechanical or electrical power," it appears that sec. 391(a), and therefore sec. 435, applies to the COMET. On the other hand, it could be argued that sec. 367, which was passed after sec. 361, was intended to supersede it in part. Sec. 367 provides in part that "existing laws covering the inspection of steam vessels are made applicable to seagoing vessels of 300 gross tons and over propelled in whole or in part by internal-combustion engines to such extent and upon such conditions that may

be required by the regulations of the commandant of the Coast Guard. . ." It could be argued, especially in light of an opinion of the Attorney General that sec. 361 was ambiguous and required clarifying legislation, 38 Op.Atty.Gen. 441 (1938), that sec. 367 was intended to limit the treatment of diesel powered vessels as steam vessels to those diesel powered vessels over 300 gross tons. Thus, the 15 ton COMET could not be covered by sec. 391(a) and 435. In any case, the question is academic since the defendant has conceded "whichever set of statutes is examined, the sanctions imposed are the same". Defendant's memorandum of law at 3.

APPENDIX C

§390a. Inspection--Frequency and requirements

(a) The Secretary shall, at least once every three years, cause to be inspected each passenger-carrying vessel, and shall satisfy himself that every such vessel (1) is of a structure suitable for the service in which it is to be employed; (2) is equipped with the proper appliances for lifesaving and fire protection in accordance with applicable laws, or rules and regulations prescribed by him; (3) has suitable accommodations for passengers and the crew; and (4) is in a condition to warrant the belief that it may be used, operated, and navigated with safety to life in the proposed service and that all applicable requirements of marine safety statutes and regulations thereunder are faithfully complied with.

Fees for inspection and certificate, license, or permit

(b) The Secretary may prescribe reasonable fees or charges for (1) any inspection made and (2) any certificate, license, or permit issued pursuant to sections 390-390g, 404, 526f of this title or the rules and regulations established hereunder. May 10, 1956, c. 258, §2, 70 Stat. 152.

§390b. Rules and regulations

In order to secure effective provision against hazard to life created by passenger-carrying vessels and to carry out in the

most effective manner the provisions of sections 390-390g, 404, and 526f of this title, the Secretary shall prescribe such rules and regulations as may be necessary with respect to design, construction, alteration, or repair of such vessels, including the superstructures, hulls, accommodations for passengers and crew, fittings, equipment, appliances, propulsive machinery, auxiliary machinery, and boilers; with respect to all materials used in construction, alteration, or repair of such vessels including the fire prevention and fire retardant characteristics of such materials; with respect to equipment and appliances for lifesaving and fire protection; with respect to the operation of such vessels, including the waters in which they may be navigated and the number of passengers which they may carry; withrespect to the requirements of the manning of such vessels and the duties and qualifications of the operators and crews thereof; and with respect to the inspection of any or all the foregoing. May 10, 1956, c. 258, §3, 70 Stat. 152.

§390c. Certificate of inspection--Issuance prerequisite to operation; exception

(a) No passenger-carrying vessel shall be operated or navigated until a certificate of inspection in such form as may be prescribed by the regulations promulgated by the Secretary under the authority of sections 390-390g, 404, and 526f of this title, has been issued to the vessel indicating that the vessel is in compliance with the provisions of said sections, and the rules and regulations established

hereunder; except that when a foreign passenger-carrying vessel belongs to a nation which is signatory to the International Convention for Safety of Life at Sea, a valid safety certificate issued to the vessel pursuant to the Convention may be accepted in lieu of the required certificate of inspection.

Compliance

(b) Any passenger-carrying vessel to which a valid certificate of inspection has been issued pursuant to this section shall during the tenure of the certificate be in full compliance with the terms of the certificate.

Surrender; withdrawal for noncompliance

(c) A certificate of inspection issued pursuant to this section may at any time be voluntarily surrendered and shall be withdrawn and suspended or revoked for noncompliance with any applicable requirements of sections 390-390g, 404, and 526f of this title or regulations thereunder. May 10, 1956, c. 258, §4, 70 Stat. 153.

§390d. Violations; penalty, liability; jurisdiction

Any owner, master, or person in charge of any vessel subject to sections 390-390g, 404, and 526f of this title who violates the provisions of said sections, or the rules and regulations established hereunder, shall be liable to the United States in a penalty of not more than $1,000 for each such violation, for which sum the passenger-carrying vessel

shall be liable and may be seized and proceeded against by way of libel in any district court of the United States having jurisdiction of the violation. May 10, 1956, c.258, §5, 70 Stat. 153.

§391. Hulls and equipment--Steam vessels carrying passengers; annual inspection

(a) The head of the department in which the Coast Guard is operating shall require the Coast Guard to inspect before the same shall be put into service, and at least once in every year thereafter, the hull of every steam vessel carrying passengers; to determine to its satisfaction that every such vessel so submitted to inspection is of a structure suitable for the service in which she is to be employed, has suitable accommodations for passengers and the crew, and is in a condition to warrant the belief that she may be used in navigation, with safety to life, and that the vessel is in full compliance with the applicable requirements of this title of Acts amendatory or supplementary thereto and regulations thereunder; and if deemed expedient, to direct the vessel to be put in motion or to adopt any other suitable means to test her sufficiency and that of her equipment.

(d) Whenever it is found on board any vessel subject to the provisions of this title, or any Acts amendatory or supplementary thereto, that any equipment, machinery, apparatus, or appliances do not conform to the requirements of law or regulations promulgated thereunder, the owner or master of

said vessel shall be required to place the same in proper condition; and if there shall be found on board any such vessel any life preserver or fire hose so defective as to be incapable of repair, the owner or master shall be required to destroy the same in the presence of an official designated by the head of the department in which the Coast Guard is operating. In any of the foregoing cases the requirements may be enforced by revoking the certificate of said vessel, and by refusing to issue a new certificate until the requirements have been fully complied with. In any case where the head of the department in which the Coast Guard is operating has delegated to a Coast Guard official the authority to enforce the said requirements by revocation of certificates of inspection, the action of said Coast Guard official may be reversed, modified, or set aside by the head of the department in which the Coast Guard is operating on proper appeal by the owner or master of said vessel. Appeals shall be made to the head of the department in which the Coast Guard is operating within thirty days after the final action of the aforesaid Coast Guard official.

Exemptions

(e) Vessels subject to inspection under this title or Acts amendatory or supplementary thereto while laid up and dismantled and out of commission may, by regulations established by the head of the department in which the Coast Guard is operating, be exempted from any or all inspection under this section and sections 392, 404, and 405 of this title. R.S. §4417; Dec. 21, 1898, c. 29, §4, 30 Stat. 765; Mar. 3, 1905,

c. 1454, §1, 33 Stat. 1023; Mar. 4, 1913, c. 141, §1, 37 Stat. 736; 1946 Reorg.Plan No. 3, §§101-104, eff. July 16, 1946, 11 F.R. 7875, 60 Stat. 1097; June 4, 1956, c. 350, §1, 70 Stat. 223.

§435. Reinspections and notice for repairs; enforcement of requirements

In addition to the annual or biennial inspection, the head of the department in which the Coast Guard is operating shall require the Coast Guard to examine, at proper times, inspected vessels arriving and departing to and from their respective ports, so often as to enable them to detect any neglect to comply with the requirements of law, and also any defects or imperfections becoming apparent after the inspection aforesaid, and tending to render the navigation of such vessels unsafe; and if there shall be discovered any omission to comply with the law, or that repairs have become necessary to make such vessel safe, the master shall at once be notified in writing as to what is required. All inspections and orders for repair shall be made promptly. When it can be done safely, repairs may be permitted to be made where those interested can most conveniently do them. And whenever it is ascertained that any vessel subject to the provisions of this title or Acts amendatory of supplementary thereto, has been or is being navigated or operated without complying with the terms of the vessel's certificate of inspection regarding the number and class of licensed officers and crew, or without complying with the provisions of law and her said certificate as to the number or

kind of life-saving or fire-fighting apparatus, or without maintaining in good and efficient condition her lifeboats, fire pumps, fire hose, and life preservers, or that for any other reason said vessel cannot be operated with safety to life, the owner or master of said vessel shall be ordered to correct such unlawful conditions, and the vessel may be required to cease navigating at once and to submit to reinspection; and in case the said orders shall not at once be complied with, the vessel's certificate of inspection shall be revoked, and the owner, master, or agent of said vessel shall immediately be given notice, in writing, of such revocation; and no new certificate of inspection shall be again issued to her until the provisions of this title of Acts amendatory or supplementary thereto have been complied with. Any vessel subject to the provisions of this title of Acts amendatory or supplementary thereto operating or navigating or attempting to operate or navigate after the revocation of her certificate of inspection and before the issuance of a new certificate, shall, upon application by a department or agency charged with the enforcement of such title or Acts, to any district court of the United States having jurisdiction, and by proper order or action of said court in the premises, be seized summarily by way of libel and held without privilege or release by bail or bond until a proper certificate of inspection shall have been issued to said vessel: Provided, That the owner, master, or person in charge of any vessel whose certificate shall have been so revoked may within thirty days after receiving notice of such revocation appeal to the head

of the department in which the Coast Guard is operating for a re-examination of the case, and upon such appeal the said head of the department shall have power to revise, modify, or set aside such action of revocation, and direct the issuance to such vessel of her original certificate or of a new certificate of inspection; and in case the said head of the department shall so direct the issuance of a certificate, all judicial process against said vessel based on this section shall thereupon be of no further force or effect, and the vessel shall thereupon be released. R.S. §4453; Mar. 3, 1905, c. 1454, §2, 33 Stat. 1023; Mar. 4, 1913, c. 141, §1, 37 Stat. 736; 1946 Reorg.Plan No. 3, §§ 101-104, eff. July 16, 1946, 11 F.R. 7875, 60 Stat. 1097; June 4, 1956, c. 350, §4, 70 Stat. 225.

No. 76-807

In the Supreme Court of the United States

OCTOBER TERM, 1976

MICHAEL B. GERCEY, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

DANIEL M. FRIEDMAN,
Acting Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A7) is reported at 540 F. 2d 536. The opinion of the district court (Pet. App. A8-A29) is reported at 409 F. Supp. 946.

JURISDICTION

The judgment of the court of appeals was entered on August 19, 1976. A petition for rehearing was denied September 13, 1976. The petition for a writ of certiorari was filed on December 9, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the United States can be held liable under the Suits in Admiralty Act for failure to undertake and carry out an enforcement program, institution of which is discretionary with the United States.

STATUTE INVOLVED

The relevant provisions of 46 U.S.C. 390a-390d are set forth in Pet. App. A30-A33. 46 U.S.C. 742 provides in pertinent part:

> In cases where if such vessel were privately owned or operated, or if such cargo were privately owned or possessed, or if a private person or property were involved, a proceeding in admiralty could be maintained, any appropriate nonjury proceeding in personam may be brought against the United States * * * .

STATEMENT

Petitioners are the parents of Steven Gercey, who drowned when the motor vessel COMET sank off Rhode Island on May 19, 1973. In this action against the United States, brought under the Suits in Admiralty Act, 41 Stat. 525, as amended, 46 U.S.C. 741 *et seq.*,[1] petitioners alleged that the Coast Guard negligently caused their son's death by failing to prevent the voyage of an illegally operated, privately-owned vessel.

Pursuant to a federal safety program that requires the Coast Guard to inspect small passenger-carrying vessels at least once every three years (46 U.S.C. 390 *et seq.*), the Coast Guard inspected the vessel COMET on May 19, 1971, at Providence, Rhode Island (Pet. App. A9). The COMET, a 30-year-old, 49-foot wooden motor vessel, capable of carrying up to 39 passengers, failed to pass the Coast Guard

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[1]Petitioners brought this action under the Federal Tort Claims Act, 28 U.S.C. 2671 *et seq.* The district court determined (Pet. App. A13-A14) that a remedy is provided petitioners under the Suits in Admiralty Act and therefore that the Federal Tort Claims Act does not apply. See 28 U.S.C. 2680(d).

inspection (Pet. App. A2). Without the certificate, the COMET could not lawfully carry six or more passengers for hire (46 U.S.C. 390c), and, if it were to do so, its owner or its master would be liable for up to $1,000 in fines for each violation (46 U.S.C. 390d). The owner of the COMET, the University of Rhode Island, notified the Coast Guard that it did not plan to repair the vessel and that it would be placed in "wet storage" (Pet. App. A9). In September 1971, the COMET was sold to William Jackson, who proceeded to carry large groups of fee-paying passengers on it during 1972 and 1973. On May 19, 1973, a group of people, including Steven Gercey, chartered the vessel and went on a fishing trip off the coast of Rhode Island. The COMET sank approximately 45 minutes after departure. Steven Gercey, William Jackson, and 15 other passengers did not survive (Pet. App. A3, A9-A10).

Petitioners then brought this action against the United States under the Suits in Admiralty Act. They contended that after the Coast Guard revoked the vessel COMET's certificate to operate as a "passenger-carrying vessel" it negligently failed to take further positive steps to protect individuals like their son from the danger of voyaging on the vessel and that this negligence was the cause of their son's death.

The district court granted the government's motion for judgment on the pleadings. It noted that petitioners had failed to make any factual allegations that, standing alone or operating through inference, would support a conclusion that follow-up programs, such as those suggested by petitioners to the court, or other actions by the Coast Guard, would have prevented Gercey's death. It therefore concluded that petitioners had failed to allege that the government's purported negligence was the cause-in-fact of Gercey's death (Pet. App. A23-A24).

The court of appeals affirmed (Pet. App. A1-A7). The court determined that there was, in fact, sufficient evidence of causation to provide an issue for jury consideration, but it based its decision on the ground that the Suits in Admiralty Act does not waive sovereign immunity to petitioners' claim. The court noted the decision whether to institute a follow-up program to prevent utilization of decertified vessels "involves a basic policy judgment as to how the public interest may best be promoted" (Pet. App. A5), and the court concluded that the exercise of such judgment does not give rise to liability under the Suits in Admiralty Act.

DISCUSSION

The decision of the court of appeals is correct and does not warrant review by this Court.

1. The court of appeals correctly determined that Congress, in providing in 1960 that suits against the United States for those maritime torts that previously could be maintained only under the Federal Tort Claims Act would be brought under the Suits in Admiralty Act, did not intend to permit the federal courts to assume executive responsibility for reviewing basic policy "decisions concerning the public interest in maritime matters" (Pet. App. A7). The court rested this result upon its conclusion that Congress had not intended to subject the United States to suit for the exercise of "discretionary functions," which the court defined as "basic 'policy judgments as to the public interest' " (Pet. App. A6). The result also may be supported by the separate but related consideration that the Coast Guard was under no duty to take any action with respect to decertified vessels and therefore as a matter of law its inaction was not negligent.

a. Suits brought under the Federal Tort Claims Act are subject to an exception for claims "based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused." 28 U.S.C. 2680(a). There is no indication that Congress intended, in the course of transferring certain maritime tort actions against the United States from the Federal Tort Claims Act to the Suits in Admiralty Act, to remove this exception.

The provision under which petitioners brought suit was added to the Suits in Admiralty Act in 1960 by Pub. L. 86-770, 74 Stat. 912. The purpose of the amendment was to remove the confusion concerning the respective jurisdictions of the federal district courts and the Court of Claims, confusion that was necessitating frequent transfer of cases. S. Rep. No. 1894, 86th Cong., 2d Sess. 6 (1960). The amendment provided for the first time that suits could be maintained against the United States under that Act in cases where, if a private party had been the defendant, a proceeding in admiralty could have been maintained. Prior to this amendment, while maritime tort actions arising out of federal government ownership of vessels and cargo could be maintained under the Suits in Admiralty Act, other actions against the United States for money damages for maritime torts could be brought only under the Federal Tort Claims Act. See, *e.g.*, *Indian Towing Co.* v. *United States*, 350 U.S. 61.

In view of the limited purpose of the amendments, which were intended only to clarify obscurities in jurisdictional language (S. Rep. No. 1894, *supra*, at 5, 6, 10), it is reasonable to conclude that Congress did not intend to revise existing substantive law to subject the government to substantial new liability concerning the exercise of its

discretionary functions. This conclusion is supported by the absence of references in the legislative history to any imposition of new liability upon the government or to the waiver of immunity to suits based upon allegations of the improper exercise of discretionary functions.[2]

In the present case, the Coast Guard decision that petitioners contend was negligent unquestionably was "a basic policy making decision" (Pet. App. A7) and would be classified as an exercise of a discretionary function under the Federal Tort Claims Act. The decision involved basic policy determinations concerning whether the increased protection from some kind of follow-up program would be sufficient to warrant a diversion of such agency resources from other regulatory activities (see Pet. App. A5-A6).

b. Negligence can be found only if the alleged tortfeasor owes a duty of care to the injured party. But as the court of appeals noted, Congress has not imposed on the Coast Guard, nor has the Coast Guard assumed, a duty to devise the follow-up system that petitioners believe is required (Pet. App. A5).

It is true that a duty of care can arise if the federal government undertakes to provide a service on which the public comes to rely. *Indian Towing Co.* v. *United States*, *supra*. In the present case, however, the Coast Guard did not lead the public to rely on a program protecting against utilization of decertified vessels, nor did it make any other representation upon which decedent depended. Bare legal authority to conduct or not conduct any one of a number of programs, and the authority to choose between them or to choose none, does not describe a duty to petitioners upon which a claim in tort can be founded.

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[2]If anything, Congress appears to have believed that the exception for discretionary functions in the Tort Claims Act was little more than a codification of what otherwise would have been a judicially imposed limitation. See *Dalehite* v. *United States*, 346 U.S. 15, 27.

2. Petitioners rest heavily upon the allegation of a conflict among the courts of appeals concerning treatment of discretionary governmental functions under the Suits in Admiralty Act. But at least for the present, that conflict is one only of words, not of deeds. The Fifth Circuit has stated in *dictum* that an exception under the Suits in Admiralty Act relating to discretionary functions should not be implied. *De Bardeleben Marine Corp.* v. *United States*, 451 F. 2d 140, 146 n. 15. But that statement was made in passing, in a case in which the court held that, for other reasons, the government was not subject to suit.[3]

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[3]Although petitioners do not refer to this fact, the Fourth Circuit also has expressed the view that the exceptions of the Tort Claims Act, including that for discretionary functions, are not imported into the Suits in Admiralty Act. *Lane* v. *United States*, 529 F. 2d 175. But it cannot be said either that the Fourth Circuit would have decided this case differently from the court below or that the court below would have decided *Lane* differently from the Fourth Circuit. The issue in *Lane* was whether the United States could be held liable for the Coast Guard's failure to mark a wreck as a hazard to navigation. The court concluded that the Coast Guard had a statutory duty to exercise "care and prudence to mark submerged wrecks which constitute substantial hazards to navigation." 529 F. 2d at 179. Since no similar duty exists here (see Pet. App. A5), it cannot be said that the Fourth Circuit would have imposed liability on these facts. Moreover, the only "discretion" in *Lane* was the discretion, subject to the duty of care and prudence, to determine which wrecks "constitute real dangers to navigation." 529 F. 2d at 179. That discretion does not involve the "basic 'policy judgments as to the public interest' " (Pet. App. A6) to which the court below would confine the "discretionary function" exception. Thus it seems relatively clear that the court of appeals here, like the Fourth Circuit, would have imposed liability on the government on the *Lane* facts. There appears, therefore, to be no conflict in result.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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